POSC 311: TOPICS IN CONSTITUTIONAL LAW

SEX AND THE CONSTITUTION

Winter Term 2011

Prof. Kim Smith

Office: Goodsell 106a

Office hours: MW 9-11, Fri 1-2

This seminar explores one of the more interesting and dynamic areas of constitutional law, the doctrines surrounding government regulation of our sex lives. This topic will focus our attention on a fundamental problem in liberal political theory: The public/private distinction. How far should the government go in regulating our intimate lives? What if anything is the public’s interest in our sexual relationships? What exactly is the “right to privacy”?

This is a seminar, which demands active participation from the students. I will expect everyone to come to class every day (I will accept valid excuses, but no more than two for the term). I expect you to contribute your insights, thoughts and questions even if you haven’t quite finished the readings for that day.

Your grade will be calculated as follows:

Research paper:  40%
Paper #2: 20%
Participation: 40%

Participation may include presentation of cases, class discussion, reading and responding to e-mails concerning class, and possibly some exercises and small writing assignments.

The readings are in the coursepack or on electronic reserve [R].

Week one: Introduction

Class 1: Intro: divide into law firms; how to argue a case

Class 2: Hunter, The Culture Wars

 Wolfe, The Culture War That Never Came

Class 3: A Feminist Critique of the Family

 Okin, Justice, Gender and the Family, pp. 124-169 [R]

Week two: Housing ordinance case

Class 4: Case work

Meyer v Nebraska

Pierce v Society of Sisters

Olmstead v US

Buck v Bell

Skinner v Oklahoma

Loving v Virginia

Moore v City of East Cleveland

Michael H v. Gerald D.

Troxel v Granville

Robin West, The Ideal of Liberty [R]

Class 5: Court

Class 6: Discussion

\*\*\*TOPIC DUE\*\*\*\*

Week three: Privacy theory

Class 7: Gerstein, Intimacy and Privacy, in Schoeman, Philosophical Dimensions of

 Privacy [R]

Rubenfeld, The Right of Privacy, 102 Harv. L. R. 737 (1989) [R]

Class 8: Tushnet, Legal Conventionalism in the US Constitutional Law of Privacy, in

 Paul, Miller & Paul, The Right to Privacy [R]

Rambo, Trivial Complaints, Ch. 3 [R]

Class 9: Foucault, History of Sexuality vol 1, Pt. 1 & 5;

 Foucault, Discipline and Punish, pp. 170-228

Week four: Abortion case

Class 10: Cases

Griswold v Conn, 381 US 479 (1965)

Eisenstadt v Baird

Roe v Wade

Planned Parenthood v Casey

Stenberg v Carhart

Ayotte v Planned Parenthood of New England

Gonzales v Carhart

Callahan, The Fetus and Fundamental Rights, in The Ethics of Abortion [R]

Class 11: Court

Class 12: Discussion

\*\*\*PREWRITING POSTED ON MOODLE\*\*\*

Week five: Fetal protection policy

Class 13: Case work

Pregnancy Discrimination Act

Automobile Workers v Johnson Controls

Law, Rethinking Sex and the Constitution (1984) [R]

Class 14: Court

Class 15: Discussion

\*\*\*FEEDBACK ON PREWRITING DUE\*\*\*

Week six: Sex and the first amendment

\*\*\*Break\*\*\*

Class 16: Minneapolis Ordinance

MacKinnon, Not A Moral Issue (in Feminism Unmodified) [R]

 Midterm course evaluation

Class 17: Sunstein, Pornography and the First Amendment, 1986 Duke LJ 589

Week seven: Pornography case

Class 18: Case work

Roth v US

Stanley v Georgia

Miller v California

American Booksellers v Hudnut

New York v Ferber

Reno v ACLU

Ashcroft v Free Speech Coalition

US v Stevens

Class 19: Court

Class 20: Discussion

\*\*\*FIRST DRAFTS POSTED ON MOODLE\*\*\*

Week eight: Homosexuality and the Constitution

Class 21: Workshop papers [with Carol Rutz]

Class 22: Workshop papers

Class 21: Sunstein, Homosexuality and the Constitution [R]

Gerstmann, Same-Sex Marriage and the Constitution Ch. 3 [R]

Keck, Beyond Backlash [R]

Pew Forum Reports [see links on moodle coursepage]

Week nine: Gay rights

Class 24: Case work

Bowers v Hardwick

Romer v Evans

Lawrence v Texas

Boy Scouts v Dale

Varnum v Brien

Gill v Office of Personnel Mgt

Class 25: Court

Class 26: Discussion

Week ten: Sexual liberty

Class 27: Case work

Reliable Consultants v Earle

Class 28: Court

& course evaluations

Final paper due in class

Second paper due Saturday, Mar. 12, at noon

RESEARCH PAPER

You will research and write on a topic related to the major themes of the course. The topic is fairly wide open, but the paper should include some discussion of **doctrine**.

I expect this paper to be 20-30 pages long.

* You should include a bibliography, which will typically include cases, scholarly articles and books. Your bibliography should demonstrate that you’ve explored the **best** scholarship (which will typically mean that you should not rely on Internet sources, unless you can make the case that it’s reliable and respected.)
* You should cite your sources; the conventions of legal scholarship demand that you carefully document your assertions and give credit to the authors whose works you’re drawing on. You may use Chicago Manual of Style or MLA format, as long as you’re consistent. If you have any questions about how to document legal sources, *please come see me.*

Some suggested topics (you may develop your own topic; these are just some possibilities):

* You may research a line of constitutional doctrine, such as the doctrine concerning abortion or gay marriage. Your goal would be to explain what the leading cases hold and other relevant issues, such as: where the main areas of dispute are, where the doctrine is likely to go in the future, what are the underlying philosophical or political dynamics influencing this line of doctrine, what is the larger political or social context of these decisions. Of course, you won’t be able to cover all of these issues, and you shouldn’t try. Decide what questions are most important and discuss those in depth.
* You may do an in-depth study of one major case. This study should go beyond a standard case note that explains the facts and holding of the case; you should explore the social, political, cultural, historical, religious or philosophical dimensions of the case (depending on what your main interest is).
* You may do a case study that demonstrates how the legal and philosophical issues we’ve discussed work in practice. This could be a study of how a particular institution deals with regulating intimacy or accommodating people with different sexual preferences or identities. Or you might examine the legal strategy of a group such as the ACLU or Focus on the Family, considering how they select cases, what their goals are, and how they understand the government’s role in regulating sex.
* You may do a study of the philosophy of a political or legal figure, such as Justice Roberts, Scalia, O’Connor, John Bingham or Catherine MacKinnon.
* You may do a historical study of government regulation of sex in America, focusing on a particular controversy (like regulation of sodomy or marriage).
* You may do a comparative study, comparing and contrasting the U.S. approach with that of another nation.
* For more ideas, you can do a search on Lexis/Nexis for recent stories about the government regulation of sex.

THE PROCESS:

1. You will meet with me early in the term to discuss your topic and research strategies. On Monday, Jan 10, you will turn in a statement of your topic.
2. By Friday, Jan. 28 you’ll complete the prewriting assignment (below) and post it on the moodle discussion forum. You will also read your classmates’ papers and give feedback, by Friday, Feb. 4.
3. By Friday, Feb, 18, you’ll post a first draft of your paper on the moodle discussion forum. Read your classmates’ papers in time for the workshop on Mon, Feb. 21.
4. The final paper will be due the last day of class.

**Prewriting assignment**

This is an informal (ungraded) short paper, about 3-4 paragraphs. It is designed to help you formulate your research paper. It has two parts:

* First, explain what is interesting about your research topic. Often researchers choose topics that are interesting to them personally, but you will want to focus why this topic is interesting to *other* people as well. In the process of explaining why it is interesting, of course, you will have to define your audience—the group of people you think will be interested in your paper.
* Second, tell us what sources are available for researching this topic, which ones are most useful, and why.

This assignment is due Friday, Jan. 28.

**Feedback on Prewriting and First Drafts**

You will give feedback to each of your fellow students, within a few days of posting your prewritings and drafts. The purpose of the feedback is to help your colleagues improve their papers, but also—and equally—to learn from them so that you can improve your own paper. To that end, when you give feedback on their prewriting, you should answer the following questions. (You may also make other comments that you think will be helpful to the writer.)

* How might this paper be relevant to your topic? Is the author’s argument similar to yours? Does it conflict with your point of view? Does the paper discuss cases or examples that support or undermine your argument?
* What sources has the author found that might be useful to you?

When you give feedback on first drafts, you should answer the following questions. (You may also make other helpful, critical, or encouraging comments.)

* What is useful in this paper to your own research? What ideas, arguments, information and/or sources might you use? (Note: If you do use anything from a fellow student’s paper in your final paper, be sure to acknowledge that in a footnote!)
* What do you disagree with in this paper? Why? Should you address this issue in your own paper? (Note: you might disagree with factual claims, arguments, the theoretical approach, the focus, the examples used to illustrate points, or other aspects of the paper. Your goal is to let the author know where the reader might need more convincing, and to think about where the reader of *your* paper might disagree with you.)

Paper #2:

For this paper, assume that the research papers you and your classmates are writing will be collected in an edited volume.  You should write an introduction to that volume.  Offer your reader an overview of the main themes of the book, and explain how each paper addresses those themes.  Devote at least one paragraph to each paper.

I expect this paper to be no more than 5 pages.

This paper is due Saturday, Mar.12, at noon.